Supreme Court, U.S.
FILED

No. 10-798 DEC 10 2010

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In The

Supreme Court of the United States

GREGORY L. HUDSON,

Petitioner,

v.

UNIVERSAL STUDIOS, INC.,
UNIVERSAL PICTURES, INC., and
IMAGINE FILMS ENTERTAINMENT, LLC,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the District Court and the Circuit Courts' granting and affirming summary judgment to the Respondents met the legal standard for summary judgment for copyright infringement as a matter of law and conflicts with decisions of other Courts.

2. Whether the District Court and the Circuit Courts' "barring" the Petitioner from "conducting discovery" when there is sufficient evidence on the record and in the Respondents' possession that creates genuine issues of material facts conflict with Rule 56(c) of the FRCP, CPLR 3212(f), decisions of other Courts, and due process of the law.

3. Whether the District Court and the Circuit Courts' consideration of evidence beyond the scope of the Respondent's Rule 12(b)(6) motion to dismiss the complaint and to dismiss the complaint in the alternative converts the Rule 12(b)(6) motion into a Rule 56(c) motion for summary judgment as ruled by other Courts.

4. Whether a Breach of Implied-In-Fact Contract creates the "Extra Element" that preempts summary judgment.

5. Whether granting Respondents' Attorney Fees and Costs demonstrated a "double-standard" and conflicts with other Courts and well-settled law.

QUESTIONS PRESENTED – Continued

6. Whether Circuit Judge Richard C. Wesley and District Judge, now Circuit Judge, Gerard E. Lynch should have "recused" themselves given the history of the two judges' hostile relationship towards Petitioner.

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The Per Curiam opinion whose review is sought is reproduced in the Appendix at A. The Circuit and District Court Judgments/Orders and Opinions are reproduced in the Appendix **A, B, C, D, E, H, and I**.

JURISDICTION

Jurisdiction is proper in this Court. The judgment sought to be reviewed was entered by the U.S. District Court for the Southern District of New York on October 23, 2008 "without" granting Petitioner the "opportunity to conduct discovery." Also, to review the Circuit Court's affirmation issued on March 16, 2010 (on "total submission") after removing Hudson (initially scheduled for Oral Argument on March 8, 2010) from the docket less than two days prior to oral argument without any explanation. This case was initially remanded for "further proceedings" by the Circuit Court on May 30, 2007; Presiding Judges Guido Calabresi, Rosemary S. Pooler, and (now) Associate Supreme Court Justice Sonia Sotomayor.

Hudson filed a Petition for a Rehearing with the District Court for the award of attorney fees and cost which was denied on August 5, 2009. Also, Hudson filed a petition for a rehearing with a request for rehearing *En Banc* which was granted on April 15, 2010 with exhibits. The declaration was granted on

May 18, 2010 and dismissed on July 13, 2010. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case involves revisions of the Copyright Act, 17 U.S.C. § 101, et seq. The relevant statutes and rules are reproduced in the Appendix to this Petition.

Petitioner, Gregory L. Hudson, respectfully requests that a Writ of Certiorari be granted to review the decision of the United States District Court for the Southern District of New York granting Motion for Summary Judgment for the Respondents and the affirmation of the same by the United States Court of Appeals for the Second Circuit.

STATEMENT OF THE CASE

In 1996, Hudson hand-delivered copies of his stage play scripts, *No Harm, No Foul*, an outrageous comedy and *Bronx House*, a powerful prison drama to: Dwight Meyers, a/k/a Heavy D, then CEO of Uptown Records, Jimmy Jenkins, co-founder of Uptown Records which was a subsidiary of Universal Music Group ("UMG"). Jimmy Jenkins was also CEO of J Luv Entertainment and J Luv Barber Shop. Since discovering in 2000 that the Respondents' infringement upon his work to create a movie called *Life*

starring Eddie Murphy and Martin Lawrence, released in 1999, Hudson has since filed three (3) separate Complaints.

The first Complaint ("*Hudson I*") was filed on April 26, 2002, in the Eastern District of New York ("EDNY") Court by Hudson's first attorney, Mirna L. White ("White") of the Law Offices of Adams, Douglas and White for copyright infringement, and Unfair Competition.

On or about October 1, 2002, Ms. White coerced Hudson into withdrawing *Hudson I* on the false premise that it would be immediately re-filed after clarification of the validity of Hudson's certificate of registration. On the advice of counsel, Hudson agreed to a "withdrawal." *Hudson I* was dismissed "without prejudice" as a result of "an unsigned letter" from the U.S. Copyright Office claiming that Hudson did not have a valid copyright registration. This unsigned letter stated that Hudson's registration was being "halted" as a result of a "bounced check." That was untrue; a copy of Hudson's valid certificate was annexed to his first Complaint. Hudson applied for, and received, a second registration as the controversy surrounding the original registration was being resolved. Hudson fired Ms. White on December 13, 2002 and subsequently filed a Complaint against her with the Brooklyn Bar Association ("BBA") for trying to extort money from him in exchange for his case file. Hudson prevailed and regained most of his files.

Hudson subpoenaed Verizon telephone records (from 1996 to 2003) of Universal Music Group

("UMG"), J Luv Entertainment and Hudson's home telephone number which establishes beyond any doubt a nexus, the timeline, and that contact and communications between the parties existed. The Respondents along with Ms. Leah D. Weitzman (of the law firm SHERMAN PRYOR CASHMAN FLYNN's) attempted to "quash" the phone records but was denied by Magistrate Judge Lois Bloom in the EDNY Court. Hudson also produced a document entitled "Agenda" which pinpoints the timeline of delivery of his materials to 1996 and explicitly discusses his business relationship and pending scheduled meeting with the Respondents to discuss writing movies and television shows for J Luv Entertainment and to complete the agreement/offer made to him for the use of his work and/or ideas.

A second Complaint ("*Hudson II*") was filed on February 28, 2003, in the EDNY Court by Hudson, *Pro Se,* for copyright infringement and unfair competition. On or about August 1, 2003, Hudson hired Claudio Baio ("Ms. Baio") of the Law Offices of Baio and Associates located in the state of Connecticut, as counsel and Ms. Baio hired Ms. Karen Steinberg ("Ms. Steinberg") as New York Counsel. Ms. Steinberg was knowingly and intentionally misled about the details of *Hudson II* by Ms. Baio. Judge Bloom describes Ms. Steinberg's position as " . . . holding the bag" as a result of Ms. Baio's misconduct. Ms. Steinberg appeared, with Hudson, at the September 24, 2003 conference and was totally confounded, confused, perplexed, and subsequently unprepared to

represent Hudson; Steinberg received a "firm chastising" from Judge Bloom. (*See Court Transcript dated September 24, 2003 and October 2, 2003 at pp. 1-20*). Judge Bloom immediately scheduled the October 2, 2003 conference ("third conference") and issued an order, directing both Ms. Steinberg and Ms. Baio to appear and justify their actions or inaction, as well as Ms. Baio's "suspicious" attempt to recuse herself, which threw the case into turmoil. Judge Bloom also made it very clear that Ms. Baio had in fact breached the attorney/client privilege by discussing details of *Hudson II* with her insurance company and others. (*See pp. 1-10 of Court Transcript*). When pressed for a clearer and more complete answer by Judge Bloom, Ms. Baio claimed that her malpractice insurance "was going to be at risk" if she represented Hudson because Hudson was in essence suing Universal Pictures . . . big deal. Ms. Baio was eventually recused, but not before receiving a very strong chastising as a result of Judge Bloom's displeasure for her "unprofessional and unethical" misconduct.

> ***"I'm not going to keep you in and Mr. Hudson in with an attorney who is not going to be representing his interest fully . . . and I don't want you to ever sign a notice of appearance if you haven't looked into the matter and intend to pursue the matter."*** *Judge Bloom to Ms. Baio.*

Ms. Baio was recused and Hudson resumed representing himself *Pro Se*. (*See Judge Bloom's order at p. 5, ¶ 1, dated December 02, 2003*). *Hudson II* was subsequently dismissed.

On May 20, 2004, the Petitioner filed a notice of appeal (*Hudson II*) to the Second Circuit Court of Appeals. Hudson was informed that all of the documents in his case file were missing with the exception of a few. His inquiries were ignored, the caption was suspiciously changed from *Hudson v. Universal Pictures Corporation, Inc., et al.*, to *Hudson v. Imagine Films Entertainment Corporation* and the Courts adopted the incorrect caption all the way to this Supreme Court of the United States.

Hudson made some unsuccessful attempts to obtain help from the Brooklyn DA's office, the U.S. Attorney General's Office, and the New York Branch of the Federal Bureau of Investigation ("FBI") on February 4, 2005 to help recover his "missing case file" which suddenly began to resurface afterwards. On December 2, 2004, parties filed appeal briefs and affirmation was ordered on April 1, 2005. Hudson's motion for default judgment against Dwight Meyers and request to amend his Complaint to include *Bronx House* was ignored by the Circuit Court. On August 27, 2005, Hudson filed a *Petition for a Writ of Certiorari* to the *Supreme Court of the United States*, which was docketed on February 10, 2006; *docket #05-1009*. On February 13, 2006, the Respondents filed a "*Waiver*" and *waived* the right to oppose the *Writ*. Hudson's certificate was denied on April 18, 2006.

The third Complaint (*"Hudson III")* was filed on August 30, 2004, in the Southern District of New York Court ("SDNY") by Hudson (*Pro Se)* claiming Breach of Implied-In-Contract, Copyright Infringement, and Unfair Competition. *Hudson III* was filed in the Southern District Court of New York as a result of being barred by the EDNY Court from including and/or enjoining *Bronx House* in *Hudson II.*

Hudson III was dismissed on a res judicata claim on April 28, 2006. On appeal, the case was remanded back for further proceeding on May 30, 2007; presiding Judges, Guido Calabresi, Rosemary S. Pooler, and Associate Supreme Court Justice, Sonia Sotomayor. After being "remanded for further proceeding," the District Court disregarded the order, granted the Respondents' leave to re-file their motion, "without any discovery," and dismissed the Complaint again. (**App. D**) Hudson appealed but the Circuit Court affirmed. (**App. C**) Hudson requested a rehearing and for a rehearing *En Banc*; the motion for rehearing was allegedly reviewed and then dismissed. (**App. A**) The District Court sanctioned Hudson for attorney fees and costs while rejecting his motions for reconsideration and stay; the Circuit Court again affirmed which brings Hudson back to this U.S. Supreme Court for a second time.

REASONS FOR GRANTING THE PETITION

I. Introduction.

Petitioner submits the following in support of his Writ of Certiorari to review the decision of the Second Circuit Court of Appeals affirmation of the United States Southern District Court of New York, granting Respondents Summary Judgment. In granting summary judgment, the lower court departed from the accepted standard of review set by this Court in *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340 (1991); CPLR 3212(f); (*Alvord & Swift v. Muller Constr. Co., Inc.*, 46 N.Y.2d 287 (1978)); Rule 56(c) of the Fed. R. Civ. P.; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986); and *Desny v. Wilder*, 299 P.2d 257 (Cal. 1956). Notwithstanding, one of the trial Judges and a Circuit Judge failed to recuse themselves from the case given their adverse history against the Petitioner.

The decision of the Second Circuit conflicts with *other Circuit Courts* including its own long standing rule on Breach of Implied-In-Fact Contract in *Thurman V. Whitfield (A Pro Se) v. Norman Lear Productions, Inc., Tat Communications Co., Topper Carew and Rainbow Television Workshop, Inc.*, 751 F.2d 90 (2d Cir. 1984); before Judges Oakes, and Winter, Circuit Judges and Claire, District Judge on the issue as to whether "a Breach of Implied-In-Fact Contract" in copyright infringement cases create the "extra element" that preempts summary judgment and what

act or conduct by an offeree constitutes an offer to pay.

Lastly, using this Court's supervisory powers to correct these tragic and unjust wrongs will send a stern message that "stealing from Independent Artists is *not* tolerated, is *not sanctioned* by this Court, and is *not a birthright* passed down from their predecessors to *illegally exploit* these Independent Artists." This message will also prevent a sure and massive confrontation between Independent Artists, their families, friends, and supports against the entertainment industry. For these reasons, the Petition for a Writ of Certiorari should be granted.

II. Standard of Review.

In order to survive a motion for summary judgment, a party must "set forth facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e).

Summary judgment is appropriate where "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). In this case before this Honorable Court, there *is no* such discovery and there have never been any pleadings, depositions, or discovery.

In deciding a motion for summary judgment, the court must "draw all factual inferences in favor of, and take all factual assertions in the light most

favorable to, the party opposing summary judgment." *Sheldon v. Metro-Goldwyn Pictures*, 81 F.2d 49 (2d Cir. 1936). The initial burden rests on the movant to demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *see Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

The Respondents in this case have never provided any evidence to demonstrate the absence of a genuine issue of material fact and that no "substantial similarity" between the works existed. Even when they attempted to impeach factual evidence presented by Hudson, their argument was easily defeated by Judge Lynch:

(*December 8, 2004 Conference; see transcript ¶ 1, p. 11*).

> Respondents: " . . . And the lack of even the tenuous similarity between these works would prevent that before you ever got into any other issue that might develop."
>
> Judge Lynch: "I hear that but that sounds like a factual issue."

The role of a Judge is not to weigh the evidence, instead to find if a material fact to be tried exists, because substantial similarity is customarily an extremely close question of fact and summary judgment in copyright infringement litigation is traditionally frowned upon. (*See Arnstein v. Power*, 154

> F.2d 468 (1946)); *id.* at 474; "Courts have observed that summary judgment is peculiarly inappropriate in copyright infringement cases due to their inherent subjectivity." (*See Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972, 977 (2d Cir. 1980), *cert. denied*, 449 U.S. 841, 101 S. Ct. 121, 66 L. Ed. 2d 49 (1980)).

Hudson provided "Certified Verizon Telephone Records" showing numerous conversations between Hudson and the Respondents as well as a document entitled "AGENDA." The AGENDA explicitly discusses Hudson's contact and communications with the Respondents (Cheryl Jenkins, Jimmy Jenkins's sister, regarding the meeting with Heavy D, Jimmy Jenkins, and others) from the very beginning of these actions. The Respondents responded by attempting to "quash" the Verizon Telephone Records but failed and was expressly told by the Honorable Magistrate Judge Bloom that Hudson could in fact use the telephone records to help make his case. This evidence is "Dispositive."

Judge Bloom: (*Court Transcript, p. 26, ¶ 4, October 2, 2003; 03-CV-1008*)

> *"If he showed, for instance, that around the date that his play was being shown that Heavy D was calling to any of the other defendants, he could make the argument that he was being talked about. He could."*

Here a "triable issue" was presented and explained to the Respondents but again, for reasons unexplained, this "dispositive" and "exculpatory

evidence" has strangely been "suppressed" and never mentioned or discussed in any opinions in this decade-old case.

III. Whether the District Court and the Circuit Courts' granting and affirming summary judgment to the Respondents met the legal standard for summary judgment regarding copyright infringement or conflicts with decisions of other courts.

Establishing a claim of copyright infringement requires that the plaintiff show (1) "ownership of a valid copyright," (2) copying of the copyrighted work, and (3) that the copying amounts to an "unlawful appropriation." *Laureyssens v. Idea Group, Inc.*, 94 F.2d 131, 139-40 (2d Cir. 1992), *citing Arnstein v. Porter*, 154 F.2d 464, 468 (2d Cir. 1946). "The Plaintiff-Appellant must show that the Defendants-Appellees' work is substantially similar to the plaintiff's protected expressions" *only*; and not the Plaintiff-Appellant's entire work. (*See Appalachian Artworks, Inc. v. Toy Loft, Inc.*, 684 F.2d 821, 829 and n. 11 (11th Cir. 1982)).

In *Rogers v. Koons*, 960 F.2d 301 (2d Cir.), *cert. denied*, 506 U.S. 934 (1992) the Second Circuit, while recognizing that the copyrighting of a whole work "does not mean that every element of it is copyrighted: copyright protection extends only to those components of the work that are original to the creator," went on to say: "But the quantity of the originality that need be shown is modest – only a dash of it will do." *Id.* at 307.

> "We must recognize that dissimilarity between some aspects of the works will not automatically relieve the infringer of liability," for "no copier may defend the act of plagiarism by pointing out how much of the copying he has not pirated." (*Rogers v. Koons*, 960 F.2d 301, 308 (2d Cir.), *cert. denied*, 506 U.S. 934 (1992)). It is only when the similarities between the protected elements of the plaintiff's works are of "small impart" ***quantitatively*** or ***qualitatively*** that the defendant will be found innocent of infringement. *Id.* (*See Nimmer on Copyright, supra, §13.03[B][1][a]*)."

It is an undisputable fact that the Respondents' first draft dated June 27, 1996, #D00002, beyond a doubt establishes they did not have a work until they received, viewed, and offered to pay Hudson for the use of his work. It is this fact that accounts for the similarities between the works; in short, the Respondents copied Hudson's work and decided not to pay him for the use or for his ideas. Substantial similarity, and in some instances "striking similarities," do exist between the works; however, "All issues of facts with respect to independent creation must be established prior to a party moving for summary judgment . . . " (*See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970)).

Other than the draft scripts, the Respondents have not submitted any admissible evidence to impeach Hudson's evidence pursuant to Rule 1002 of the Fed. R. Evid. It states "that an original document

should be produced in court when its terms are material to the argument – when it is the 'best evidence' available."

The proper way to gauge the alleged infringement in this case is from a ***quantitative*** or ***qualitative*** standpoint, including the *doctrine of de minimus*. It is an undisputed fact that Hudson's work was created long before the Respondents.'

> "Testimony or Written Admission of Party Contents of writings, recordings, or photographs may be proved by the testimony or deposition of the party against whom offered or by that party's written admission, without accounting for the nonproduction of the original." (*See* Fed. R. Evid. Rule 1007).

Finally, "When the originality of a copyrighted work is at issue, it becomes a question of fact for the jury to resolve. See the jury charge appearing in 3 Devitt, Blackmar and Wolff, *Federal Jury Practice and Instructions* (4th ed. 1987) at § 99.04, p. 808 (advising the jury in copyright actions that "[the] first disputed issue is originality," and going on to define that concept)." That has never been the case in *Hudson v. Universal*.

IV. Whether the District Court and the Circuit Court's "barring" the Petitioner from "conducting discovery" when there is sufficient evidence on the record and in the Respondents' possession that creates genuine issues of material facts conflicts with Rule 56(c) of the FRCP, CPLR 3212(f), decisions of other Courts, and due process of the law.

"Any motion for summary judgment made prior to any discovery, or when further discovery is needed because crucial facts are peculiarly within movant's knowledge, is inappropriate because it seriously disadvantages the party or parties against whom the motion is brought." (CPLR 3212(f); *Alvord & Swift v. Muller Constr. Co., Inc., supra*).

In a memo dated May 6, 2005, the Respondents filed a memo to the District Court claiming, "None of the parties named in Hudson's Complaint were employees/agents and/or representatives of Universal Studios and that discovery be stayed under Fed. R. Civ. P. 26(c), to protect the parties from undue burden and expense, pending disposition of the motion" in response to a memo filed by Hudson, dated April 27, 2005 requesting that the parties, "immediately proceed on all matters (active and/or pending) as prescribed under Rule 26(f) Fed. R. Civ. P." The Respondents have made this SAME CLAIM (starting with their ***Answer Brief*** in 2002 – *Hudson I*). The lower court adopted the Respondents' request, granted them leave to file a motion to dismiss and denied Hudson request to conduct discovery. ***It is this***

ruling that "woefully departs" from long standing rules of other Circuits and statutes with respect to discovery. Fed. R. Civ. P. 56(c)(1)(A) requires, "A party asserting that a fact cannot be or is genuinely disputed must support the assertion" by:

> "citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials;" or Fed. R. Civ. P. 56(c)(1)(B) states, "showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact."

The motion should not be made until it is ripe for adjudication, since "[i]t is only in exceptional cases that a plaintiff's right to present his claims to a court of law should be cut off by a premature motion for summary judgment" (*Alvord & Swift v. Muller Constr. Co., Inc., supra*, 46 N.Y.2d at 287). Motions made prior to any discovery, or when further discovery is needed because crucial facts are peculiarly within movant's knowledge, is inappropriate because it seriously disadvantages the party or parties against whom the motion is brought. (CPLR 3212(f); *Alvord & Swift v. Muller Constr. Co., Inc., supra* ["To limit the availability of discovery before he had conducted the discovery to which he is entitled"]; *Ross v. Curtis-Plamer Hydro-Elect. Co.*, 81 N.Y.2d 494, 506 (1993)).

CPLR 3212[b] also "requires the motion to be supported by a copy of the pleadings, by affidavit, and by other available proof such as depositions and written admissions." Submission of the pleadings as part of the motion papers is a necessity (*Duprey v. Carrier Corp.*, 204 A.D.2d 977) [motion denied when pleadings not submitted]; *Freeman v. Easy Glider Roller Rink*, 11 A.D.2d 4 [motion denied when pleadings not submitted]. Since the Respondents provided no admissible evidence to support their claim, their motion must be denied as a matter of law.

Hudson requested discovery "specifically to ascertain, inter alia, the full nature of the relationships between the parties. This information will help advance the case with respect to the promise to pay Hudson for his work and some other relevant evidence that is within the parties' knowledge." (*Reply Br. ¶ 3 p. 10*).

Courts routinely allow discovery for "Good Cause." On June 4, 2008, in this same District Court (Judge Brieant presiding), *UMG Recordings, Inc., et al. v. DOES 1-4*, 08-CV-5149, UMG quickly and aggressively moved for discovery pursuant to Rule 26(b) (Fed. R. Civ. P.) to determine the identities of DOE Defendants who were being sued for copyright infringement and was granted leave for discovery for "Good Cause." Despite the Court's denying Hudson discovery, Hudson discovered and submitted "indisputable evidence," identifying the parties as employees/agents/representatives of Universal Studios. Dwight Meyers was CEO of Uptown Records and Jimmy

Jenkins turned out to be the "co-founder" of Uptown Records, along with Andre Harrell. This evidence and more *is* and *always* has been in the hands and knowledge of the Respondents. It is public record and can easily be obtained through discovery. Either these parties had no nexus to Universal or the Respondents and their attorneys have committed perjury. Notwithstanding, Judge Lynch is a firm supporter of Rule 56(c) with respect to *only denying* a party the right to discovery in the "**rarest case**;" *citing* "***only in the rarest cases will a party be denied discovery***"; yet he denied Hudson, but offered no reasons or cited what made Hudson one of those "**rarest cases**." Rule 56(c) clearly establishes that a party must have a reasonable opportunity to make the case. If Hudson cannot conduct proper discovery, then it stands to reason that he cannot properly make his case; that is the "***sine qua non***." This matter beckons for this Court to use its supervisory powers and grant Hudson his legal right to procedural due process and discovery.

Fortunately, *Rule 56(f)* provides a method for parties to defeat (or at least postpone) summary judgment in such a situation and Plaintiffs have availed themselves of it. Where for some reason the opposing party cannot set forth facts sufficient to survive a motion for summary judgment, Rule 56(f) gives the opposing party opportunity to submit an affidavit explaining the reason. (*See Korf v. Ball State Univ.*, 726 F.2d 1222, 1230 (7th Cir. 1984) (*quoting Willmar Poultry Co. v. Morton-Norwich Prods., Inc.*,

520 F.2d 289, 297 (8th Cir. 1975)); *Lamb's Patio Theatre v. Universal Film Exchs.*, 582 F.2d 1068, 1071 (7th Cir. 1978) (same); *see also Davis v. G.N. Mortgage Corp.*, 396 F.3d 869, 886 (7th Cir. 2005)).

The court may then "refuse application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just." Fed. R. Civ. P. 56(f). Hudson was never given any of these opportunities.

V. Whether the District Court and the Circuit Court's consideration of evidence beyond the scope of the Respondents' Rule 12(b)(6) motion to dismiss the Complaint and to dismiss the Complaint in the alternative converts the Rule 12(b)(6) motion into a Rule 56(c) motion for summary judgment as ruled by other Courts.

When a defendant makes a 12(b)(6) motion and refers to matters outside the pleading, the court may convert the motion to a motion for summary judgment and analyze the evidence under the standard of Rule 56. *See Levenstein v. Salafsky*, 164 F.3d 345, 347 (7th Cir. 1998).

This rule of law is seemingly "crystal clear" here, but the lower court seems to disagree with it as well as with other circuits and settled law. ***It is this disagreement, confusion, or whatever the case***

may be as to the lower court's ruling, understanding, or misunderstanding that the public begs for clarification on.

> "If on a [12(b)(6)] motion . . . to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56. In other words, the court has two options when matters outside the pleadings are presented on a motion under 12(b)(6): exclude consideration of the matters outside the pleadings or convert the motion to one for summary judgment."

The issue here is that, on May 6, 2005, the Respondents requested leave to file a 12(b)(6) motion to dismiss the Complaint and alternatively to dismiss the Complaint on a Rule 56(c) motion for summary judgment and was endorsed by the Court on May 10, 2006. On September 12, 2005, the Respondents filed their Res Judicata "motion to dismiss the Complaint pursuant to Rule 12(b)(6) of the Fed. R. Civ. P., and alternatively dismissing the Complaint for summary judgment pursuant to Rule 56(c) of the Fed. R. Civ. P." (*See Def's mem. of law, ¶ 1, p. 3*). Hudson immediately filed a "motion to strike" on the grounds that the Rule 12(b)(6) motion provided evidence beyond the scope of the motion. Hudson pled with the Court

to deny this motion and proceed with discovery pursuant to Rule 26. Unconvinced, the Court accepted the Respondents' motion in its entirety – a three or four inch booklet containing "everything except evidence providing prior adjudication."

On February 16, 2006, Magistrate Judge Theodore H. Katz issued a Report and Recommendation ("R&R") that was woefully wrong and misleading to dismiss the Complaint in its entirety. Hudson vigorously objected to the R&R on the grounds that Judge Katz was "totally confused" about the facts and evidence of the case and that Judge Lynch should dismiss or set aside the R&R pursuant to Fed. R. Civ. P. 72 and 28 U.S.C. § 636(b)(1)(c), and alternatively demanded a "trial by jury" pursuant to Fed. R. Civ. P. 38(a)(b) and other relief.

Again, the lower court disregarded Hudson's pleas, adopted the magistrate's R&R and dismissed Hudson's Complaint on April 28, 2006, citing: ***"For these reasons, plaintiff's objections to the R&R are overruled, the R&R is adopted as the opinion of the Court, the defendants' motion to dismiss the Complaint or for summary judgment is granted, and the Complaint is dismissed."*** **(App. G)** There can be no mistake here! The Respondents requested ***summary judgment in the alternative*** and the Court granted their wish, thereby disqualifying them from re-filing the same claim. Granting a second filing of their claim is in direct contrast to

other Circuits, particularly the Seventh Circuit. (*See Levenstein v. Salafsky*, 164 F.3d 345, 347 (7th Cir. 1998)).

Hudson appealed this ruling and on May 30, 2007, the Circuit Court remanded the case (**App. F**) back for further proceeding; Presiding Judges Guido Calabresi, Rosemary S. Pooler, and Associate Supreme Court Justice, Sonia Sotomayor citing:

> "Thus, we are unwilling in these muddled circumstances to impose 'the drastic remedy of foreclosing a party for litigating an essential issue.'" *Flaherty v. Lang*, 199 F.3d 607, 616 (2d Cir. 1999) (*quoting McNellis v. First Fed. Sav. and Loan Ass'n*, 364 F.2d 251, 257, (2d Cir. 1966))" and concluding, "We are not persuaded by the defendants' argument that Hudson's letter to the court in *Hudson II*, in which he stated he did not want to amend his Complaint, indicates Hudson's voluntary relinquishment of an opportunity to amend his Complaint and raise claims regarding *Bronx House*. This letter was sent after Hudson had been expressly admonished by the magistrate judge that he could not bring in new claims" regarding *Bronx House*.

Ironically, nearly a half decade later, this same case falls back into the hands of Justice Sotomayor mainly because the lower court totally ignored her "remand for further proceedings ruling"; the District Court simply granted the Respondents "another bite at the apple" by allowing them to file a bogus Rule 56(c) motion for summary judgment claiming that,

"Hudson never responded to this prong of the Respondents' claim; a false claim clearly contradicted by the record." As Hudson pointed out in his reply brief, this claim was nothing more than a desperate attempt to revive the Respondents' dead motion. Any claim that Hudson did not respond is absurd; even if he didn't (which he did) there is no law that mandates that Hudson respond. To the contrary, if he does not respond, then he loses by default. *So again, a ruling on this issue is needed to settle the dispute between the Second Circuit, the Seventh Circuit, as well as others.*

VI. Whether a Breach of Implied-In-Fact Contract creates the "Extra Element" that preempts summary judgment.

An "Implied-In-Fact" breach of contract claim is for breach of "implied contract." It seeks compensation not for the actual written script, but for the idea allegedly embodied in the script and shared. (*See Desny v. Wilder*, 299 P.2d at 257 (Cal. 1956)). "The contract claim turns not upon the existence of a [copyright] . . . but upon the implied promise to pay the reasonable value of the material disclosed." *Id.* at 1196 (*See Desny v. Wilder*, 299 P.2d at 257 (Cal. 1956)).

On the issue of the breach of Implied-In-Fact contract, the ***Desny* Rule** is clearly the legal standard adhered to by all Circuits. It states, "The contract turns upon the 'service rendered' for creating

the ideas and the work and time contributed." This means, "Whether the ultimate product is substantially similar is irrelevant," which flies directly in the face of the Respondents' claim that, "if the works are not substantially similar, the breached contract is moot." As this court can see, not only is this interpretation of the law misguided, but poses a direct danger to the entire notion of the *Doctrine of Stare Decisis*. Again, Judge Lynch is in total accord with Desny citing to the Respondents:

> ***"But if I give them the idea and they, under circumstances that would create an obligation to pay for them for the ideas, then it doesn't matter whether the ultimate product is substantially similar, right?"*** *District Judge Gerard E. Lynch (App. 1 – Court transcript p. 10 ¶ 2 December 8, 2004 Conference).*

Judge Lynch agrees whole heartily with Desny, but when it comes to Hudson, he again rules against him in spite of the rule of law or evidence.

There is another very important issue here that this Court must clarify. Whether a Breach of Implied-In-Fact Contract creates an "Extra Element" in a copyright infringement case that bars a Court from granting a motion for summary judgment for Respondents; especially when a Petitioner was barred from discovery and sufficient evidence is on the record to demonstrate the possibility and/or likelihood that an offer to pay was made, accepted, and/or understood if Petitioner's work and/or ideas were

used by Respondents. In *Desny*, "*Our prior decision in Landsberg v. Scrabble Crossword Game Players, Inc.*, 802 F.2d 1193, 1196-97 (9th Cir. 1986), *supports treating the implied promise to pay by Desny as an 'extra element' for preemption purposes.*" This is the standard by which all Circuits follow and the S.D.N.Y. Court does not have the authority to rule in contrast. The Second Circuit has long since established well-settled law with respect to what constitutes a Breach of Implied-In-Fact Contract and there is no need to disturb it. In order to maintain some sense of "uniformity" within all other Circuits including the Ninth Circuit, this Court should again use its supervisory powers to clarify this issue.

In *Thurman V. Whitfield (A Pro Se) v. Norman Lear, Tandem Productions, Inc., Tat Communications Co., Topper Carew and Rainbow Television Workshop, Inc.*, 751 F.2d 90 (2d Cir. 1984), before Judges Oakes, and Winters, Circuit Judges and Claire, District Judge, ***Judge Winters cites:***

> "[T]he idea purveyor cannot prevail in an action to recover compensation for an abstract idea unless (a) before or after disclosure he has obtained an express promise to pay, or (b) the circumstances preceding and attending disclosure, together with the conduct of the offeree acting with knowledge of the circumstances, show a promise of the type usually referred to as 'implied' or 'implied-in-fact.'"

Judge Winters went on to say:

> " . . . There is no evidence of an express contract between Whitfield and any of the defendants. However, California law will imply a contract from the conduct of parties in certain circumstances." In identifying such conduct, "Thus, if a producer accepts a submitted idea with full knowledge that the offeror expects payment in the event of use, California courts impose liability under a theory of implied-in-fact contract." *Desny v. Wilder*, 46 Cal.2d 715, 299 P.2d 257 (1956) (*en banc*).

The "legal hurdle" on this issue that the Respondents must overcome "TURNS" upon whether the Respondents can "disprove" that an offer to pay Hudson for the use of *any of his ideas* or *works* and secondly, whether Cheryl Jenkins, Jimmy Jenkins and Dwight Meyers a/k/a Heavy D were employees/agents/representatives or acting as thereof on behalf of Universal Music Group. The Verizon Telephone Records are "dispositive"; and provides an "undisputable nexus" between the parties, including Universal Studios. These facts and evidence cannot be manufactured. The Verizon Telephone Records are "certified," "true," and "correct."

The *Desny* rule is justified on the theory that the bargain is not for the idea itself, but for the services of conveying that idea. (*See Donahue v. Ziv Television Programs, Inc.*, 54 Cal. Rptr. 130, 140 (Ct. App. 1966)). In *Desny*, 299 P.2d at 257, the California

Supreme Court explained that where an idea is furnished by one party to another, a contract sometimes may be implied even in the absence of an express promise to pay. The Second Circuit has and continues to follow *Desny*. (*See Nadel v. Play-by-Play Toys & Novelties*, 208 F.3d 368 (2d Cir. 2000) *reversed a district Court's grant of summary judgment.*) (*Abrogating its holding in Murray that (f) or contract-based claims in submission-of idea cases, a showing of novelty to the buyer will supply sufficient consideration to support a contract.*)

In *Wrench L.L.C. v. Taco Bell Corp.*, 256 F.3d 446 (6th Cir. 2001), the District Court granted summary judgment, which the Sixth Circuit later reversed citing: "The alleged implied-in-fact contract at issue in ***Wrench***, which entailed the expectation that the creators Psycho Chihuahua would be compensated if Taco Bell used their ideas, ***gave rise to the 'extra element' required to remove an idea thief claim from the purview of copyright preemption***."

For reasons unknown or explained by the District Court or the Second Circuit Court, they both have simply ignored Hudson's Breach of Implied-In-Fact Contract "***Cause of Action***" which by every other Circuit is the "***Extra Element***" that preempts summary judgment. These rulings against Hudson depart from the accepted laws and practices of other Courts and this Court's supervisory authority is desperately needed to clarify this issue.

VII. Whether granting Respondents Attorney Fees and Costs demonstrated a "double-standard" and conflicts with other Courts.

The standard for an award of attorney fees and costs have long since been established in this Court. The Supreme Court identified the following non-exclusive list of factors to guide the award or denial of attorney fees: "*frivolousness, motivation, objective unreasonableness* (both in the factual and in the legal components of the case), and the need in particular circumstances to advance considerations of compensation and deterrence." *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 534 n. 19 (1994) (citation omitted). None of the above factors are applicable here. The lower court here has again departed from the precedence established in *Fogerty* by and applied a double-standard by sanctioning Hudson for fees and costs by falsely claiming that "Hudson did not respond to the Respondents' motion for fees in a timely fashion" (**App. E**); in other words he either WAIVED his rights or DEFAULTED, none of which are true. The court records clearly show that Hudson responded numerous times to both Courts. On March 26, 2009, Hudson filed a memo requesting an extension to June 15, 2009, to file his opposition to attorney fees and costs due to "surgery on his left wrist," as well as for an extension to file his appeal brief. Hudson opposed the award of fees in his appeal brief and reply brief and believed that these oppositions were sufficient and proper. Hudson was later informed that he needed to

file a separate motion. He then requested time from both Courts.

Between the wrist surgery, some family tragedies (on file) and other matters, the Respondent's motion for fees was misplaced. Since the inception of this matter, Hudson has *never* failed to timely respond to anything in these matters: Why would he knowingly "ignore" the motion by not providing his financial information on the most important motion of all? Surely, he does not have $40,000.00 to pay or otherwise. In any event, Hudson opposed the fees in his motion to the lower court, but was again rejected. Hudson opposed the fees in his appeal brief and in his reply brief, but was told that he must file a separate motion with the lower court which he did and was again rejected. On appeal, Hudson requested additional time to file a motion opposing the fees which was granted (**App. H**) and again, the lower court's decision was affirmed. The Courts can argue that "Hudson's filing was improperly filed in the wrong briefs," but cannot argue that he defaulted. If this is the standard Hudson is being judged by, then:

1) Both Courts should have granted Hudson's $25,000,000.00 dollar DEFAULT JUDGMENT against Dwight Meyers in (*Hudson I*) who never appeared and to this very date . . . has never appeared; 2) The Respondents did not "properly file" their opposition brief to Hudson's appeal in a "timely fashion." Hudson filed a motion pursuant to Rule 31(c) of the Fed. R. App. Proc. to bar Respondents from being heard at oral argument. The Circuit immediately jumped to

the Respondents' defense arguing that "the Respondents filed their brief timely; but filed it with the U.S. Post Office Depository for reasons *never* explained"; Hudson received the Respondents' brief 5 days late. (**App. I**); 3) In 2004, in *Hudson I*, the Circuit Court affirmed the lower Court's ruling against Hudson, but ordered him to pay costs pursuant to Rule 39(d)(1) or the Fed. R. App. Proc. On the contrary, in 2007 the Circuit Court remanded in Hudson's favor but again denied Hudson costs; 4) In 2009, the Circuit Court affirmed this current action and again, ordered Hudson to pay costs and fees. (**App. B**) Now that the Courts could not meet the legal standard to sanction Hudson for attorney fees, they fabricated this loophole claiming default and assessed Hudson nearly $40,000.00. If this Court looks deeper, it will find that these sanctions are merely "retaliation" against Hudson for "daring to fight such a vigorous fight" against the Respondents, judges, lawyers, and anyone else who has entered this matter in an adverse manner opposing Hudson.

Any decent, respectable human being would view this treatment as *arbitrary and capricious* and a despicable *double-standard* that promotes discrimination and "spits in the face" of ***Brown v. Board of Education***, which banned "separate but equal treatment." This Court must step in, reinforce ***Brown v. Board of Education***, and restore ***justice***, ***fairness***, and ***integrity*** within the judicial system by vacating the judgments and all fees and costs against Hudson. These rulings are wrong, unjust, have no place in this

society, and set our judicial system back 1000 years beyond slavery.

VIII. Whether Circuit Judge Richard C. Wesley and District Judge, now Circuit Judge, Gerard E. Lynch should have "recused" themselves given the history of the two judges' hostile relationship towards Petitioner.

§100.2 A JUDGE SHALL AVOID IMPROPRIETY AND THE APPEARANCE OF IMPROPRIETY IN ALL OF THE JUDGE'S ACTIVITIES

A judge shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary; the evidence and the court records will clearly show that since Hudson gave his works to the Respondents in 1996, NYCRRR §100.2(A) has not been the case for Hudson with the exception of the Honorable Magistrate Judge Lois Bloom and the Circuit Panel of Judges Calabresi, Pooler, and Justice Sotomayor.

Prior to this third appeal since 2003, Hudson filed a formal Complaint against Judge Lynch (which he later withdrew) giving Lynch the benefit of the doubt for accepting the "misleading R&R" by Judge Katz; a formal Complaint and 3 letters requesting that Judge Wesley *NOT* preside over any of his arguments. On March 8, 2010, Hudson was scheduled for oral argument and Judge Wesley (appointed head judge) and his panel, without giving any reasons, "removed" Hudson from the docket with less than two

days notice. The Second Circuit simply left a message on Hudson's answering machine informing him that his case was now being heard on "total submission."

In an effort to gain a full and fair opportunity to present his case before an impartial judge, Hudson reached out to Senator Jeff Sessions, Senate Judiciary Committee Chair who has a very long standing history with Judge Lynch and as he puts it, " . . . Lynch's activist rulings as opposed to the legal interpretation of the law." Hudson requested, but received no response, to speak before the Senate before or during Judge Lynch's confirmation to the Second Circuit. Hudson then reached out to President Obama, who nominated Lynch, and U.S. Attorney General, Eric Holder. A reasonable person could easily conclude that these rulings against Hudson were indeed acts of "retaliation."

> " . . . the state is bound to furnish to every litigant not only an impartial judge, but one who has not, by any act of his, justified a doubt of his impartiality." (*McCormick v. Walker*, 142 N.Y.S. 759, 764, *aff'd*, 158 A.D. 54 (1st Dept. 1913)).

The stormy history between Hudson, Judge Lynch, and Judge Wesley impeaches any notion of "impartiality."

28 U.S.C. §455(a) in pertinent part provides that:

> A Justice, Judge, or Magistrate of the United States is required to recuse himself "in any proceeding in which his impartiality might

> reasonably be questioned." Based on 28 U.S.C. § 455(a), Judge Wesley and Judge Lynch by all standards should have recused themselves.

These improper and retaliatory rulings against Hudson are simply a "microcosm" of lawyers, corporate executives, and judges' wrath against independent artists who stand up to protect their work, rights, and to feed their families. For example:

> This pending case of *Rene Carranza v. Universal Music Group and Lideres*, Case No.: CV 09-3604 GW (CWx), his entire CD, produced, distributed, and sold it without his authorization. They registered it with the U.S. Copyright Office under their names. They initially offered him a $200,000.00 contract and reneged. When Carranza insisted on the contract, he was told that "if he continued to call them, they would report him to immigration"; believing that he was in the country illegally which he is not. The question that we (the public) want to know is "why aren't these thieves arrested?" They stole his work, used his image, and registered his work illegally. His case is set for trial on February 1, 2011 and why has there been no arrest for these crimes; because it's Universal Studios?

Another recent case involving *Universal, General Crook v. Universal Music Group, #2*, 03-cv-00047-PMP-LRL:

> Universal took Mr. Crook's entire song catalogue and recorded one of the songs entitled,

> "*Message to the World.*" They released and sold the song on the album of the group called, "The Chilites." UMG claimed that they paid Mr. Crook by check for a "mechanical license" to use the song and that Mr. Crook was represented by a lawyer (now a judge) named Leonard Levin. Crook argued that he provided the Nevada District Court with evidence that the alleged bank where the check was allegedly cashed did not exist; provided state official documentation that he was not issued a drivers license under the name General Crook during the time the check was allegedly cashed, and an affidavit from Judge Levin stating that "he did not know of anyone by the name of General Crook nor had he ever represented him."

Crook states that, "Nevada District Court Judge Phillip Pro disregarded this evidence, ruled against Crook and was affirmed by the Ninth Circuit."

Other recent cases involving similar rulings are:

> *Troy Walker v. Viacom International, et al.* #cv-6-4931; *Darryl Lassiter v. 20th Century Fox*; *Sophia Stewart v. Warner Brothers, CV 03-2873 mmm (VBKX)*; *William Crawford v. Midway Games, Inc.*, #2:07-cv-0096 *just to name a few.*

In any event, Universal Studios seemingly have been granted some sort of "illegal license" to steal the work of Independent Artists by the judicial system.

CONCLUSION

Viewing all evidence in the light most favorable to the Petitioner (*See Sheldon v. Metro-Goldwyn Pictures*, 81 F.2d 49 (2d Cir. 1936)), which is the standard that is applicable to the review of summary judgment and questions of material fact do exist here, *especially with respect to the claim of a stage play being pirated and turned into a movie.* In the recent case of *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000) this Court stated that "the court should give credence to the evidence favoring the nonmovant as well as that 'evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that evidence comes from disinterested witness.'" *Reeves* at 2110. In the instant case, a jury question is present because the Petitioner presented evidence that, when taken as a whole, created a fact issue as to whether the defendants were in fact employees/agents and/or representatives of UMG; whether the Verizon Telephone Records and AGENDA document establish a nexus to the parties, whether the Petitioner had a "full and fair opportunity to present his claims," whether the Respondents were foreclosed from re-litigating their Rule 56(c) motion for summary judgment; and whether the attorney fees and costs were just and in sync with the law or simply a retaliatory measure to teach Hudson and other independent artists a lesson for trying to litigate their meritorious claims against parties deemed "untouchable" by some Courts. Since the Honorable Justice Sotomayor has previously

ruled on this case and has firsthand knowledge of its facts and evidence, Hudson prays that her Honor would take the lead in this matter, vacate these judgments and instruct the lower court to "adhere to her original order along with Judges Calabresi and Pooler, which was to "remand this case for further proceeding."

Respectfully submitted,

GREGORY L. HUDSON, Pro Se
146-61 182nd Street
Springfield Gardens, NY 11413
(718) 341-8997

APPENDIX A

09-0187-cv
Hudson v. Universal Studios, Inc.

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 16th day of March, two thousand and ten.

PRESENT: PIERRE N. LEVAL,
ROBERT D. SACK,
RICHARD C. WESLEY,
Circuit Judges.

GREGORY L. HUDSON,

Plaintiff-Appellant,

– v. – 09-0187-cv

UNIVERSAL STUDIOS, INC.,
UNIVERSAL PICTURES, INC.,
IMAGINE FILMS ENTERTAINMENT, LLC,

Defendants-Appellees.

FOR APPELLANT: GREGORY L. HUDSON, *pro se,* Springfield Gardens, NY.

FOR APPELLEES: RICHARD DANNAY, THOMAS KJELLBERG, Cowan, Liebowitz & Latman, P.C., New York, NY

Appeal from the United States District Court for the Southern District of New York (Lynch, *J.*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of the district court be **AFFIRMED**.

Appellant Gregory L. Hudson ("Appellant"), *pro se,* appeals from a judgment of the district court granting the Defendants' motion for summary judgment, thereby dismissing his claims for breach of implied contract, copyright infringement, and unfair competition under the Lanham Act, 15 U.S.C. §§ 1117 and 1125(a). He also moves to reverse the district court's July 2009 order awarding the Defendants $38,904.80 in costs and attorneys' fees pursuant to 17 U.S.C. § 505. We assume the parties' familiarity with

the underlying facts, the procedural history of the case, and the issues on appeal.

We review orders granting summary judgment *de novo,* and focus on whether the district court properly concluded that there was no genuine issue as to any material fact and the moving party was entitled to judgment as a matter of law. *See Miller v. Wolpoff & Abramson, L.L.P.,* 321 F.3d 292, 300 (2d Cir. 2003). In determining whether there are genuine issues of material fact, we are "required to resolve all ambiguities and draw all permissible inferences in favor of the party against whom summary judgment is sought." *Terry v. Ashcroft,* 336 F.3d 128, 137 (2d Cir. 2003) (internal quotation marks omitted).

Upon consideration, we conclude that the district court properly granted summary judgment to the Defendants because no reasonable jury could have found that the Defendants' motion picture is substantially similar to Appellant's play.

Accordingly, we affirm the district court's judgment for substantially the same reasons as those articulated by that court. We have considered all of Appellant's remaining claims of error and find them to be without merit.

In addition, because Appellant never filed a timely notice of appeal from the district court's July 2009 order awarding attorneys' fees to the Defendants, and because any notice of appeal would now be

untimely, Appellant's motion with respect to those fees is denied.

For the foregoing reasons, the judgment of the district court is hereby **AFFIRMED**.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

GREGORY L. HUDSON, Plaintiff,	:	04 Civ. 6997 (GEL)
– v –	:	**OPINION AND ORDER**
UNIVERSAL STUDIOS, INC., et al.,	:	(Filed Oct. 23, 2008)
Defendants.	:	

Gregory L. Hudson, *pro se.*

Richard Dannay and Thomas Kjellberg,
Cowan, Liebowitz & Latman, P.C.
New York, NY, *for defendants.*

GERARD E. LYNCH, District Judge:

Plaintiff, appearing pro se, brought this action for copyright infringement under the Federal Copyright Act, 17 U.S.C. § 101 *et seq.*, breach of implied contract under New York law, and unfair competition under § 43(a) of the Lanham Act, 15 U.S.C. § 1125(a), alleging that Universal Studios, Inc., Universal Pictures, Inc., and Imagine Films Entertainment, LLC, used, without permission or compensation, his original plays *Bronx House* and *No Harm, No Foul* in creating the motion picture *Life.* This Court initially dismissed Hudson's complaint in its entirety, finding the claims barred by res judicata. *Hudson v. Universal Studios,*

Inc., No. 04 Civ. 6997 ("*Hudson III*"), 2006 WL 1148695, at *1 (S.D.N.Y. Apr. 28, 2006). The Court of Appeals affirmed the dismissal of Hudson's claims related to *No Harm, No Foul,* but vacated and remanded his claims related to *Bronx House* for further proceedings. *Hudson v. Universal Studios, Inc.* ("*Hudson IV*"), 235 F. App'x 788, 790 (2d Cir. 2007). Defendants now move for summary judgment on Hudson's *Bronx House* claims on the grounds that (1) there is no substantial similarity between *Bronx House* and *Life*; (2) plaintiff cannot establish the existence of a valid contract or a breach of the contract alleged; and (3) the Lanham Act cannot support plaintiff's claim of unfair competition. Defendants' motion for summary judgment will be granted.

BACKGROUND

Plaintiff Gregory Hudson is the author of the play *Bronx House.* (Pl.'s Statement Pursuant to Local Civil Rule 56.1 ¶ 1.) Hudson claims to have delivered a copy of his *Bronx House* script to defendants during the spring of 1996. (*Id.* ¶ 5.) In 2002, believing that the motion picture *Life,* distributed by Imagine Films and Universal Studios, infringed upon his copyrighted work *No Harm, No Foul,* Hudson sued defendants and others in the Eastern District of New York. *Hudson v. Seagrams, Inc.*, No. 02-CV-2571 ("*Hudson I*"). *Hudson I* was dismissed on the consent of both parties because Hudson had failed to register

his copyright for *No Harm, No Foul*.[1] In 2003, after registering his *No Harm, No Foul* copyright, Hudson again sued defendants and others. *See Hudson v. Universal Pictures Corp.*, No. 03-CV-1008 ("*Hudson II*"), 2004 WL 1205762, at *1 (E.D.N.Y. Apr. 29, 2004). Although Hudson's complaint in *Hudson II* alleged only that *Life* was copied from *No Harm, No Foul*, in the course of the proceedings, Hudson argued and introduced evidence that *Life* was also copied from *Bronx House*. *Id.* at *4. The *Hudson II* court ruled that "no reasonable jury could find a substantial similarity between the protected elements of *No Harm, No Foul* and *Life*," and that the claim of similarity between *Bronx House* and *Life* was similarly "meritless." *Id.* The court granted defendants' motion for summary judgment and dismissed the complaint. *Id.* at *5. The court's judgment was affirmed by summary order in *Hudson v. Imagine Entertainment Corp.*, 128 F. App'x 178, 179 (2d Cir. 2005).

After his complaint was dismissed in the Eastern District, Hudson brought suit in this district, again alleging that *Life* infringed both *Bronx House* and *No Harm, No Foul*. This Court, adopting the Report and Recommendation of Magistrate Judge Theodore H. Katz, found Hudson's claims barred by *Hudson II*. *Hudson III*, 2006 WL 1148695, at *1. The Court of Appeals affirmed the dismissal of claims stemming

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[1] Under 17 U.S.C. § 411(a), "no action for infringement" can be instituted "until preregistration or registration of the copyright claim has been made in accordance with [copyright law]."

from *No Harm, No Foul. Hudson IV,* 235 F. App'x at 790. However, mindful of plaintiff's status as a "pro se litigant" and the somewhat "muddled circumstances" under which Hudson's *Bronx House* claims were adjudicated in *Hudson II,* the Second Circuit remanded plaintiff's *Bronx House* claims to this Court for further proceedings. *Id.*

Defendants now move for summary judgment on the merits of Hudson's *Bronx House* claims.

DISCUSSION

I. Summary Judgment Standard

Summary judgment is appropriate where "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). In deciding a motion for summary judgment, the court must "draw all factual inferences in favor of, and take all factual assertions in the light most favorable to, the party opposing summary judgment." *Rule v. Brine, Inc.,* 85 F.3d 1002, 1011 (2d Cir. 1996). The initial burden rests on the movant to demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986). This shifts the burden to the non-moving party who must "by affidavits or as otherwise provided . . . set out specific facts showing a genuine issue for trial." Fed. R. Civ. P. 56(e)(2). Additionally, the non-moving party must "come forward with enough evidence

to support a jury verdict in its favor." *Bryant v. Maffucci,* 923 F.2d 979, 982 (2d Cir. 1991).

II. Copyright Infringement

A. Legal Standard

Establishing a claim of copyright infringement requires that the plaintiff show (1) "ownership of a valid copyright," (2) copying of the copyrighted work, and (3) that the copying amounts to an "unlawful appropriation." *Laureyssens v. Idea Group, Inc.*, 964 F.2d 131, 139-40 (2d Cir. 1992), citing *Arnstein v. Porter,* 154 F.2d 464, 468 (2d Cir. 1946). For purposes of this motion, defendants contest neither the first nor the second element. (D. Mem. 19.) Instead, they claim to be entitled to summary judgment because no unlawful appropriation occurred. (*Id.*)

Copying amounts to "unlawful appropriation" when "substantial similarity" exists between two works. *Laureyssens,* 964 F.2d at 140. Generally, summary judgment on issues of substantial similarity is "frowned upon." *Hoehling v. Universal City Studios, Inc.,* 618 F.2d 972, 977 (2d Cir. 1980). Nevertheless, summary judgment is appropriate "when all alleged similarity" is related only to "non-copyrightable elements of the plaintiff's work." *Id.* Noncopyrightable elements include "facts [and] ideas," as distinguished from the particular expression of such facts and ideas. *Harper & Row Publishers, Inc. v. Nation Enters.,* 471 U.S. 539, 547 (1985). "The distinction between an idea and its expression is an

elusive one." *Williams v. Crichton,* 84 F.3d 581, 587-88 (2d Cir. 1996). But the nub is that an author must use creativity to transform facts and ideas into an expression that "display[s] the stamp of the author's originality." *Harper & Row,* 471 U.S. at 547. If the similarity between two works rests solely on a shared underlying idea, rather than the particular way in which that idea has been portrayed, there is no "substantial similarity."

Examples help illustrate the principle. In *Williams,* the author of the book series *Dinosaur World* brought suit against the author of *Jurassic Park* for copyright infringement. 84 F.3d at 582. *Jurassic Park* and *Dinosaur World* expressed many similar ideas. Both were works about a dinosaur zoo. *Id.* at 589. Both stories centered a small group of individuals, including a knowledgeable adult guide and young dinosaur enthusiasts. *Id.* Both depicted harrowing encounters with carnivorous dinosaurs from which the human characters escaped, via helicopter, "through the combined wit of the children and adults." *Id.* However, "those scenes that appear[ed] similar in their abstract description prove[d] to be quite dissimilar once examined in any detail." *Id.* at 590. Similarly, there were "many differences" in the characters "beyond the superficial similarities" such as their age, gender, and the fact that the children were siblings. *Id.* at 589. Moreover, the characters in *Dinosaur World* were only weakly developed, and "the less developed the characters, the less they can be copyrighted." *Id.*, quoting *Nichols v. Universal Pictures*

Corporation, 45 F.2d 119, 121 (2d Cir. 1930). Because *Dinosaur World* and *Jurassic Park* were similar only with respect to the general ideas they depicted and not the way they expressed those ideas, there was no substantial similarity as a matter of law.

Similarly, in *Mattel, Inc. v. Azrak-Hamway Int'l, Inc.,* 724 F.2d 357 (2d Cir. 1983), the manufacturer of "Masters of the Universe" action figures sought an injunction against the makers of "Warlords" action figures. *Id.* at 359. The torsos of the two action figures were very similar, sharing "overdeveloped musculature," "legs proportionately shorter" than average, similar shape, and nearly identical size. *Id.* at 360. Additionally, both toys were "posed" in a "similar crouching position." *Id.* The court determined that the similarities were not an unlawful appropriation of artistic expression because the similarities, while significant, were "attribut[able] to the fact that both [were] artist[s'] rendering[s] of the same unprotectable idea – a superhuman muscleman crouching in . . . a traditional fighting pose." *Id.* The court pointed out that "[t]he rendering of such an idea is not protectable; only the particularized expression of that idea" is. *Id.* The Warlord figures had distinct "names, heads, feet, hands, and clothing," as well as "pectoral, abdominal, and other musculature that differ[ed] in minor though significant detail" from that of the Masters of the Universe figures. *Id.* Thus, the way the Warlord figures expressed the idea of a superhuman muscleman differed from the way that idea was expressed by the Masters of the Universe figures,

and there was no substantial similarity between the two figures. *Id.*

Elements subject to the doctrine of *scènes à faire* are also not protectable. *Scènes à faire* are "elements that follow naturally from a work's theme rather than from an author's creativity." *MyWebGrocer, LLC v. Hometown Info, Inc.*, 375 F.3d 190, 194 (2d Cir. 2004). The doctrine holds that "incidents, characters or settings which are as a practical matter indispensable, or at least standard, in the treatment of a given topic" are not protectable. *Alexander v. Haley*, 460 F. Supp. 40, 45 (S.D.N.Y. 1978). For example, attempted escapes by slaves and the chasing of fugitives through the woods with dogs are standard in a story about the slave trade and, therefore, unprotectable. *Id.* Similarly, the presence of "drunks, prostitutes, vermin and derelict cars" as well as "[f]oot chases . . . and . . . the familiar figure of the Irish Cop" are unprotectable because they appear "in any realistic work about . . . policemen in the South Bronx." *Walker v. Time Life Films, Inc.*, 784 F.2d 44, 50 (2d Cir. 1986). Likewise, "uniformed workers" managing a dinosaur zoo's exhibits are unprotectable because they "flow from the uncopyrightable concept" of a dinosaur zoo. *Williams*, 84 F.3d at 589.

B. Application

After reading the script for *Bronx House*, viewing the motion picture *Life*, and thoroughly analyzing plaintiff's supporting materials, it is clear that no

substantial similarity exists between the two works. Any similarity between the two works exists only at the most general level, in that *Life* and *Bronx House* are both set in prisons and deal with the issue of wrongful incarceration. But these are similarities only in the ideas the works seek to represent, and thus are not protectable elements of artistic expression. What little resemblance there is between *Bronx House* and *Life* is attributable solely to unprotectable elements.

There is no substantial similarity in the total concept and feel, theme, setting, or plot of *Bronx House* and *Life*. Hudson summarizes *Bronx House* as "the story of a New York City Comptroller who is accused of stealing $5,000,000.00 from the city and is jailed at the Bronx House of Detention where two rival gangs [try] to kill him." Gregory L. Hudson, *Bronx House* 3 (1994). The story is set in the 1990s, unfolds over the course of approximately one week, and seeks to portray the violence of the modern prison. The plot is driven by the attempt of the main character, Reggie, to avoid being killed by the rival gangs until his lawyer can get him released. There is only superficial interaction among the characters, who are little more than two-dimensional stereotypes (violent gang member, overbearing prison guard, tough cop, etc.).

Life, on the other hand, takes place in a prison [sic] Mississippi and tells the story, starting in the 1930s, of two men who are wrongfully incarcerated for over sixty years. It is a dramatic comedy that

portrays the psychological effect of wrongful incarceration and the development of friendships over many decades of close contact. In contrast to *Bronx House,* character interaction is central to the plot, the story takes place over many years rather than one week, and humor (an element completely lacking from *Bronx House*) plays a major role in humanizing the characters and easing tension. In their major expressive elements, there is no similarity between the two works.

Hudson's claims of similarities among specific elements in the two works are also meritless. Hudson's first specific claim is that the "boundary lines" in *Bronx House* are substantially similar to the "gun line" in *Life.* (P. Mem. 13.) The "boundary lines" in *Bronx House* are a pair of three inch wide lines drawn on the cell floor, demarcating the territory of rival gangs living within the prison. *Bronx House* 16. The "gun line" in *Life* is a wide path surrounding the entire prison complex, separating inmates from the outside world. *Life,* scene 15 (Universal Pictures 1999). Prisoners who attempt to cross it are shot. *Id.*, scene 8. The boundary line in *Bronx House* and the gun line in *Life* are expressions of a broadly similar idea – a line used to separate people – but they are different in appearance and in the specific function each plays in each story. Accordingly, there was no appropriation of a protectable element from *Bronx House.*

Hudson next asserts that the "inspections line" in *Bronx House* is substantially similar to the "inspection line" in *Life*. (P. Mem. 14.) The cell in *Bronx House* has an inspections line painted on the floor. *Bronx House* 23. Throughout the play, inmates are directed to stand on the line while they are either searched or reprimanded by a corrections officer. *Id.* This is done in order to build "drama, tension, and suspense" as the audience anticipates the inevitable violent outburst. (P. Mem. 14.) In *Life,* prisoners are also instructed to line up from time to time. However, unlike *Bronx House,* there is no painted line on the cell floor – or anywhere else – upon which prisoners stand for inspection. Instead, in three scenes, prisoners are instructed to form a line at various spots outside their bunk house. *See, e.g., Life,* scene 8. Moreover, the inspections play a different role in *Life* than they do in *Bronx House,* advancing the plot through monologues by a corrections officer with tension broken by humor. *See, e.g., id.*, scene 13. The inspections in *Life* and *Bronx House* share only the underlying idea of an inspection of prisoners, which is not protectable. Moreover, the idea of prisoners lining up for inspection is an element that flows naturally from the setting of a prison drama, and is thus an unprotectable *scène à faire. See Alexander,* 460 F. Supp. at 45.

The third alleged similarity is the style and arrangement of the prisoners' bunk beds. (P. Mem. 14.) In both works, the prisoners sleep on bunk beds arranged against the wall of their sleeping quarters

(a jail cell in *Bronx House* and a bunk house in *Life*). The *Bronx House* script describes this arrangement as "typical" for a "[j]ail cell." *Bronx House* 16. Since depicting something in a "typical" way requires no creativity by the author, Hudson effectively concedes that there is no artistic expression in the arrangement of the bunk beds in *Bronx House,* and instead the arrangement flows naturally from the setting of a prison drama, unprotectable as a *scène à faire.*

Hudson next asserts that the similarity between the phrase "Bronx House," which is short for the Bronx House of Detention, and "bunk house," which is how characters refer to the prisoners' sleeping quarters in *Life,* is a substantial similarity between the two works. (P. Mem. 15.) This claim is meritless. The Bronx House of Detention is an actual prison facility; Hudson has no protectable interest in its name or the fact of its existence. "Bunk house" is a common generic description of a dormitory or communal living area for workers or prisoners. *See* Oxford English Dictionary (2d ed. 1989) (under the entry for "bunk," defining "bunk-house" as "a house where workmen, etc., are lodged"). Not only is it a completely different concept from the proper name "Bronx House," but it is a generic and uncreative description of a type of facility common to prison – and other – settings. Hudson provides no authority, and the Court has found none, supporting the proposition that the use of a phrase can be an unlawful appropriation of a distinct, if phonetically similar, phrase.

Hudson's remaining assertions rest on similarities between three pairs of characters: (1) Sixty Nine from *Bronx House* and Biscuit from *Life*; (2) Officer Hurt from *Bronx House* and Officer Dillard from *Life*; and (3) Reggie from *Bronx House* and Claude from *Life*. (P. Mem. 15-17.) The characters in *Bronx House* are essentially undeveloped stereotypes, such that there is little expression in them that is protectable. *See Nichols,* 45 F.2d at 121. They are similar to the characters in *Life* only in regard to unprotectable ideas and facts, not creative expression.

Hudson alleges that both Sixty Nine and Biscuit are "horny, sex[-]seeking, over[-]the[-]top gay characters." (P. Mem. 16.) But Hudson cannot claim creative ownership of the idea of a horny, sex-seeking, over-the-top, gay character. Moreover, the portrayal of Biscuit in *Life* is about more than his sexual appetites. In the film's emotional climax, Biscuit, unable to cope with the prospect of his impending release, commits suicide, illustrating one of the movie's central themes about the effect of long-term incarceration on an inmate's mental health. *See Life,* scene 14. Sixty Nine plays no similar role in *Bronx House.* Indeed, the end of *Bronx House* reveals that Sixty Nine is not in fact a gay man at all, but rather a female undercover agent gathering intelligence on prison gangs. The nature and function of the characters are thus completely different. The only similarities between Sixty Nine and Biscuit are their race, their apparent sexual orientation, and the fact that

they are incarcerated. There is no similarity in protectable expression.

Hudson's claim of similarity between Officer Hurt and Officer Dillard is also meritless. Both characters are prison guards who carry weapons, speak with authority, and interact with the typical mannerisms one would associate with a domineering corrections officer. But Hudson cannot claim ownership over the idea of a tough prison guard. Moreover, in the important details, Officer Hurt and Officer Dillard share nothing in common. Officer Hurt is a woman, and as she struggles to maintain order within the prison she uses her gender as a justification for mistreating prisoners. *See, e.g., Bronx House* 33 ("If I show the least sign of weakness in here, I'm a dead woman. Women don't get the same respect as men do in here. . . . If I act friendly towards you, they take that as a weakness."). Officer Dillard, in *Life,* is male, and while we see little of his character, it is clear that maintaining order is not a challenge for him. Similarities such as the fact that Officer Hurt and Officer Dillard both carry weapons, wear uniforms, and give orders, represent the inevitable rendering of the same unprotectable idea. *See Mattel,* 724 F.2d at 360.

Finally, there is no substantial similarity between Reggie and Claude. Both are young, African-American men. But the idea of a young, incarcerated African-American male is not a protectable story element. And the way in which this idea about the characters is expressed is dramatically different.

Reggie, the protagonist in *Bronx House,* is a successful government employee who has risen to the rank of New York City Comptroller, *Bronx House* 3, while Claude is a rum-runner with plans to become a bank teller, *Life,* scenes 3-4. Reggie is able to use his friends in government and the police force to secure his safety while in prison and facilitate his quick release, while Claude has no outside support and has to spend more than sixty years behind bars.

A detailed comparison of *Bronx House* and *Life* makes clear that there is no substantial similarity between the two works. The common elements are: (1) they are set inside prisons; (2) some of the characters are African-American men; (3) the characters sleep on bunk beds arranged in a typical fashion; (4) some of the prisoners appear to be homosexual; (5) the main characters are wrongly incarcerated; (6) there are overbearing prison guards; (7) there are lines to demarcate boundaries; and (8) prisoners line up for inspections. These elements are unprotectable facts and ideas and/or *scènes à faire,* and a close inspection of the elements shows no similarity in how these ideas are expressed. Since *Bronx House* and *Life* share no protectable elements, there is no substantial similarity between the two works as a matter of law, and therefore no unlawful appropriation of Hudson's artistic expression.

III. Breach of Implied Contract

Hudson claims that defendants breached an implied contract to compensate him for any use of *Bronx House*. An implied contract is a contract in which a party's promise of performance is "inferred wholly or partly from conduct" rather than from an express oral or written agreement. *Maas v. Cornell University*, 94 N.Y.2d 87, 93 (1999), quoting Restatement (Second) of Contracts § 4 (1981). For the reasons stated above, no reasonable jury could conclude that defendants used any of Hudson's creative expression, since there is no similarity between the expressive elements of *Bronx House* and *Life*. Accordingly, there can be no claim for breaching an agreement to compensate Hudson for the use of such elements. However, there remains the possibility that defendants agreed to compensate Hudson for the use of non-expressive ideas contained in *Bronx House*, even though such ideas are not protectable by copyright.

As with all contracts, proof of an implied contract requires proof of consideration. *Maas*, 94 N.Y.2d at 94. The sharing of an idea is sufficient consideration to support a contract claim where "the idea at issue had value to the defendant at the time the parties concluded their . . . agreement." *Nadel v. Play-By-Play Toys & Novelties, Inc.*, 208 F.3d 368, 374 (2d Cir. 2000), citing *Apfel v. Prudential-Bache Securities, Inc.*, 81 N.Y.2d 470, 476 (1993). "[N]ovelty to the buyer," not novelty to the world generally, determines whether an idea has value to a defendant. *Nadel*, 208

F.3d at 377. However, "an idea may be so unoriginal or lacking in novelty that its obviousness bespeaks widespread and public knowledge of the idea, and such knowledge is therefore imputed to the buyer." *Id.* at 378. In such cases, a court may conclude, as a matter of law, that the idea lacks the novelty to the buyer necessary to support a contract claim. *Id.* at 378-79.

Such is the case here. There is certainly nothing novel in the general idea of a story about a person wrongfully incarcerated. Nor is there anything novel in the elements of the prison setting, such as the bunk beds arranged in a "typical" fashion, lines demarcating boundaries within or around the prison, or the fact that prisoners are required to stand for inspection from time to time. For the same reason that such elements are *scènes à faire* – that they are "indispensable, or at least standard, in the treatment of a given topic," *Alexander,* 460 F. Supp. at 45 – they are also not novel. Nor is there anything novel in the idea of prisoner who is African-American or homosexual, or of a prison guard who is overbearing. In creating a prison movie, a screenwriter might or might not choose to include characters with such characteristics, but the possibility would almost certainly occur to him or her. Such "ideas" are "so unoriginal [and] lacking in novelty that [their] obviousness bespeaks widespread and public knowledge." *Nadel,* 208 F.3d at

378.[2] Accordingly, they could not have been consideration in an implied contract between Hudson and defendants, and Hudson's breach of implied contract claim is without merit.

IV. Lanham Act

Finally, Hudson has no claim for unfair competition under the Lanham Act. The Supreme Court has ruled that the Lanham Act, which prohibits misrepresenting the origin of the goods one sells, was designed to protect only "tangible goods" and not "any idea, concept, or communication embodied in [such goods]." *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 37 (2003). The Court "caution[ed] against misuse or over-extension of trademark and related protections into areas traditionally occupied by patent or copyright." *Id.* at 34, citing *TrafFix Devices, Inc. v. Mktg. Displays, Inc.*, 532 U.S. 23, 29 (2001).

Since *Dastar*, Lanham Act claims arising from the alleged copying of creative work have been "clearly foreclosed." *Contractual Obligation Prods., LLC v. AMC Networks, Inc.*, 546 F. Supp. 2d 120, 129 (S.D.N.Y.

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[2] The point here is not that Hudson's play is unoriginal. The Court expresses no opinion about the literary quality of his work. Rather, the point is that the elements or ideas that defendants allegedly appropriated are the most unoriginal and generic aspects of Hudson's work, such that no reasonable jury could conclude that defendants or anyone else would have contracted to compensate him for their use.

2008). When a plaintiff's "unfair competition claims are based on the very acts of producing . . . allegedly infringing works that form the factual underpinnings [sic] its copyright claims," the unfair competition claims under the Lanham Act "fail as a matter of law." *Freeplay Music, Inc. v. Cox Radio, Inc.*, 409 F. Supp. 2d 259, 263-64 (S.D.N.Y. 2005). Because the factual underpinnings of Hudson's Lanham Act claim are identical to those of his copyright claim, the Lanham Act claim must fail.

CONCLUSION

For the foregoing reasons, defendants' motion for summary judgment is granted, and plaintiff's complaint is dismissed in its entirety.

SO ORDERED.

Dated: New York, New York
October 23, 2008

/s/ Gerard E. Lynch
GERARD E. LYNCH
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

GREGORY HUDSON, *Plaintiff*, v. UNIVERSAL STUDIOS, INC., et al., *Defendants.*	:	04 Civ. 6997 (GEL) **ORDER** (Filed Jul. 20, 2009)

GERARD E. LYNCH, *District Judge*:

On March 4, 2009, this Court granted defendants' motion for an award of fees and costs under the Copyright Act, 17 U.S.C. § 505. *Hudson v. Universal Studios, Inc.*, No. 04 Civ. 6997, 2009 WL 536564 (S.D.N.Y. Mar. 4, 2009). Pursuant to Federal Rule of Civil Procedure 54(d)(2)(C), that Order was limited to finding plaintiff liable for defendants' reasonable costs and attorney's fees, while deferring ruling on the size of the award pending receipt of appropriate documentation. *Id.* at *1 n.1. Accordingly, defendants were directed to submit documentation in support of their estimated fees and costs by March 19, 2009, and following the grant of plaintiff's request for an extension, plaintiff was given until June 15, 2009, to present any objections to the amount of fees

sought. *Id.* at *4; (Dkt. # 59). Noting the likelihood of "a significant disparity in resources between the parties," but recognizing that "a plaintiff's lack of resources is not relevant to *whether* an award of fees is appropriate, but that financial disparities may be a factor considered in determining the magnitude of an award once it has been resolved that such an award is appropriate," *id.* at *3 (internal quotations omitted), the Court directed that, to the extent plaintiff seeks a reduction in the size of the award based upon limited resources, he include in his objections, "a sworn statement of his financial status, addressing his annual income and overall assets and liabilities" *id.* at *4.

Defendants timely submitted proper documentation of the $48,522.09 in costs and fees they now seek, including detailed time records of the work performed. (Dannay Decl. ¶ 12; *id.* Exs. C-E.) In opposition, plaintiff does not specifically challenge the amount requested, nor does he appropriately document his financial status, but rather continues to argue that a fee award in itself is inappropriate and, moreover, reaches even further back to argue that the grant of summary judgment dismissing his claims was improper. These matters, of course, have already been decided, and plaintiff raises no considerations that would warrant disturbing those conclusions. Defendants' entitlement to a fee award thus firmly established, the amount of the award remains to be determined.

As previously explained in adjudicating plaintiff's liability for a fee award, in light of the history of this litigation, "defendants are not entitled to compensation for all of the costs of the litigation." *Hudson*, 2009 WL 536564, at *3. Specifically, the Court indicated that defendants would not be able to recover their costs incurred in the first round of the litigation, in which the Court initially dismissed the case on grounds of res judicata (and, in light of that disposition, did not address defendants' alternative arguments for summary judgment (*see* Feb. 16, 2006 Report and Recommendation of Magistrate Judge Katz ("R & R"), Dkt. # 22 at 31 n.6; Apr. 26, 2006 Opinion and Order Adopting R & R, Dkt. # 28)), nor would they be able to recover the costs incurred in defending against plaintiff's appeal of that dismissal. *See id.*

Defendants moved for a fee award relating to this first round of litigation, arguing not only that plaintiff's position on the res judicata issue was objectively unreasonable, but that so too was his position on the underlying merits. (Dkt. # 31.) The Court rejected both contentions and denied the fee application. (June 21, 2006 Order, Dkt. # 35.) While rejecting, for the time being, defendants' argument concerning the objective reasonableness of plaintiff's position on the merits of the similarity between plaintiff's play, *Bronx House*, and defendants' allegedly infringing work, the Court also noted that it was "likely to view any further litigation of [plaintiff's] *Bronx House* claims against defendants as frivolous and objectively

unreasonable for purposes of" awarding fees under the Copyright Act. (*Id.* at 2.)

That is precisely what occurred. Following the remand from plaintiff's partially successful appeal to the Second Circuit, defendants renewed their motion for summary judgment, which resulting [sic] in a finding on the merits that plaintiff's claims relating to *Bronx House* were unsustainable, *Hudson v. Universal Studios, Inc.*, No. 04 Civ. 6997, 2008 WL 4701488 (S.D.N.Y. Oct. 23, 2008), and, upon defendants' second motion for a fee award, that plaintiff's "obsessive pursuit" of the claims was objectively unreasonable, making an award of fees appropriate, *Hudson*, 2009 WL 536564, at *3.

Despite this history, defendants now seek to recover the entirety of the costs incurred in connection with their motion for summary judgment on the merits, including the portion of the work done prior to the remand from the Second Circuit. (Dannay Decl. ¶ 7; *id.* Ex. C.) While the Court recognizes that defendants' initial summary judgment briefing – which proved meritorious and ultimately resulted in a finding that plaintiff's copyright claim was objectively unreasonable – was done during the first phase of this litigation, the Court sees no reason to depart from its previous exercise of discretion declining to award fees for work done in connection with the earlier stage of the litigation.

Accordingly, the award will be limited to the costs incurred in phase two of the litigation – i.e., in

renewing the motion for summary judgment on remand, and in making the present fee application. For this work, defendants seek reimbursement of $38,672.80 in attorneys' fees. (Dannay Decl. ¶¶ 8-9; *id.* Exs. D-E.) Upon a review of this portion of the fees charged by defendants' counsel, they appear entirely reasonable and will be allowed in full. Indeed, the bills reveal a high degree of economy, both in terms of the time expended and in the rates charged. In total, counsel spent just over a hundred hours in this second phase, including the expenditure of time occasioned entirely by plaintiff's "frivolous motion to bar further proceedings" on the summary judgment motion, "delaying resolution of the case and increasing defendants' costs," *Hudson*, 2009 WL 536564, at *3. (Dannay Decl. Exs. D-E.) The billing rates are entirely within reason as well, ranging from $333 to $360 for a partner with over ten years of experience, and from $450 to $475 for a partner with over forty years of experience. Moreover, the overall reasonableness of the fees is corroborated by the fact that defendants, highly sophisticated business clients, have paid these bills (*id.* ¶ 6), presumably after careful review by their general counsel or other senior business executives, since – notwithstanding the Court's earlier intimation that it would be apt to view any further litigation by plaintiff as frivolous – defendants could not have assumed that they would be reimbursed in full, or even in part. Accordingly, defendants will be awarded $38,672.80 in attorneys' fees.

Defendants also seeks reimbursement of the $232.00 in expenses incurred in connection with phase two of the litigation. (Dannay Decl. ¶¶ 8-9.) Defendants have thoroughly documented these costs, which are comprised entirely of the ordinary and reasonable photocopying charges and postage fees attendant to the litigation. (*Id.* Exs. D-E.) Accordingly, they will be allowed in full.

Finally, plaintiff was explicitly advised that, to the extent he sought a reduction of the fee award on the basis of his resources, he needed to properly document his financial status by submitting a sworn statement of his income and net worth. He has not done so. Accordingly, while recognizing that a fee award approaching $40,000, while perhaps a drop in the bucket for defendants, who are major corporations, is likely quite significant for plaintiff, an individual, and although neither the Court nor defendants desire to impose ruinous financial obligations upon plaintiff, there is no basis in the record to reduce the award to accommodate plaintiff's financial situation. Plaintiff was given explicit notice of what was required of him should he seek such a reduction, and provided ample opportunity to do so, yet did not avail himself of the opportunity. As a result, despite the probable disparity in the parties' resources, defendants will be awarded their full costs attendant to phase two of the litigation.

For the foregoing reasons, defendants' are awarded $38,672.80 in attorneys' fees and $232.00 in disbursements, for a total of $38,904.80.

SO ORDERED.

Dated: New York, New York
July 20, 2009

/s/ Gerard E. Lynch
GERARD E. LYNCH
United States District Judge

Copy to:

Gregory L. Hudson
146-61 182nd Street
Springfield Gardens, NY 11413

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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GREGORY HUDSON,

Plaintiff/Appellant,

– V –

UNIVERSAL STUDIOS, INC., UNIVERSAL PICTURES, INC., IMAGINE FILMS ENTERTAINMENT LLC,

Defendants/Appellees

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DECLARATION OF GREGORY L. HUDSON IN SUPPORT OF PLAINTIFF/APPELLANT'S MEMORANDUM OF LAW TO REVERSE THE DISTRICT COURT'S OPINION & ORDER GRANTING DEFENDANTS/ APPELLEES FEES & COSTS

(Filed Oct. 6, 2009)

[This motion, and the opposition to it, are sent to the panel that will hear the appeal.]

For The Court:
Catherine O'Hagan Wolfe, Clerk

By: /s/ C. J. Minuse
Catherine J. Minuse
Supervisory Staff Attorney

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United State's Courthouse, 500 Pearl Street, in the City of New York, on the 26th day of August; two thousand and nine.

Gregory L. Hudson,

Plaintiff-Appellant,

v.

Universal Studios, Inc., Universal Pictures, Inc., Imagine Films Entertainment, LLC,

Defendants-Appellees.

ORDER

Docket Number: 09-0187-cv

(Filed Aug. 26, 2009)

IT IS HEREBY ORDERED that Appellant's motion to deny Appellees from participating in oral argument is DENIED as moot in light of Appellees having timely filed their brief on August 14, 2009.

For The Court:
Catherine O'Hagan Wolfe, Clerk

By: /s/ Judy Pisnanont
Judy Pisnanont, Motions Staff Attorney

APPENDIX F

06-3337-cv
Hudson v. Universal Studios Inc.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO SUMMARY ORDERS FILED AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY THIS COURT'S LOCAL RULE 0.23 AND FEDERAL RULE OF APPELLATE PROCEDURE 32.1 IN A BRIEF OR OTHER PAPER IN WHICH A LITIGANT CITES A SUMMARY ORDER, IN EACH PARAGRAPH IN WHICH A CITATION APPEARS, AT LEAST ONE CITATION MUST EITHER BE TO THE FEDERAL APPENDIX OR BE ACCOMPANIED BY THE NOTATION: "(SUMMARY ORDER)." UNLESS THE SUMMARY ORDER IS AVAILABLE IN AN ELECTRONIC DATABASE WHICH IS PUBLICLY ACCESSIBLE WITHOUT PAYMENT OF FEE (SUCH AS THE DATABASE AVAILABLE AT http://www.ca2.uscourts.gov/), THE PARTY CITING THE SUMMARY ORDER MUST FILE AND SERVE A COPY OF THAT SUMMARY ORDER TOGETHER WITH THE PAPER IN WHICH THE SUMMARY ORDER IS CITED. IF NO COPY IS SERVED BY REASON OF THE AVAILABILITY OF THE ORDER ON SUCH A DATABASE, THE CITATION MUST INCLUDE REFERENCE TO THAT DATABASE AND THE DOCKET NUMBER OF THE CASE IN WHICH THE ORDER WAS ENTERED.

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Daniel

Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York on the 30th day of May, two thousand and seven.

Present: GUIDO CALABRESI
ROSEMARY S. POOLER
SONIA SOTOMAYOR
Circuit Judges.

GREGORY L. HUDSON,

Plaintiff-Appellant,

v. 06-3337-cv

UNIVERSAL STUDIOS INC.,
UNIVERSAL PICTURES, INC.,
IMAGINE FILMS ENTERTAINMENT, LLC,

Defendants-Appellees.

Appearing for Appellant:

Gregory L. Hudson, pro se, New York, NY.

Appearing, for Appellees:

Richard Dannay (Thomas Kjellberg, on the brief), Cowan, Liebowitz & Litman, P.C., New York, NY.

Appeal from the United States District Court for the Southern District of New York (Lynch, *J.*)

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the petition for review be and it hereby is **AFFIRMED** in part, **VACATED** in part, and **REMANDED**.

Plaintiff-appellant Gregory L. Hudson, *pro se*, appeals the April 28, 2006, order of the United States District Court for the Southern District of New York (Lynch, *J.*) finding the entirety of Hudson's complaint barred by the doctrine of *res judicata*. *See Hudson v. Universal Studios, Inc., et al.*, No 04 Civ 6997, 2006 U.S. Dist. LEXIS 25090 (S.D.N.Y. April 28, 2006). We assume the parties' familiarity with the facts, procedural history, and specification of issues on appeal.

We review de novo the district court's dismissal based on *res judicata*. *Legnani v. Linee Aeree Italiane, S.P.A.*, 400 F.3d 139, 141 (2d Cir. 2005). "The doctrine of *res judicata*, or claim preclusion, holds that a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." *Monahan v. N.Y. City Dept of Corrections*, 214 F.3d 275, 284 (2d Cir. 2000) (internal quotation marks omitted). Res judicata applies when: (1) the previous action involved an adjudication on the merits; (2) the previous action involved the same parties or those in privity with them; and (3) the claims asserted in the subsequent action were, or could have been, raised in the prior action. *Id.* at 285.

We affirm the district court's dismissal of Hudson's claims regarding *No Harm, No Foul* as barred by *res judicata*. Identical claims of copyright infringement and unfair competition regarding this work were raised in an earlier action, and the breach of contract claim could have and should have been brought in the same action. *See Hudson v. Universal*

Pictures Corp. et al., No 03-CV-1008, 2004 U.S. Dist. LEXIS 11508 (E.D.N.Y. April 29, 2004) ("*Hudson II*").

With regard to Hudson's claims regarding *Bronx House*, however, we vacate the district court's dismissal and remand for further proceedings. Hudson, a *pro se* litigant, was expressly told by the magistrate judge in *Hudson II* that *Bronx House* was not part of the case and he would not be permitted to raise claims regarding alleged copying of *Bronx House*. Moreover, it was repeatedly emphasized by defendants and by the district court that the "sole issue" before the court in *Hudson II* was whether substantial similarity existed between *No Harm, No Foul* and *Life*. Finally, it is undisputed that no more than a single page of the script for *Bronx House* was in evidence in *Hudson II* such that no comparison for alleged similarity between *Bronx House* and *Life* could have occurred in *Hudson II*. Thus, "we are unwilling in these muddled circumstances to impose 'the drastic remedy of foreclosing a party from litigating an essential issue.'" *Flaherty v. Lang*, 199 F.3d 607, 616 (2d Cir. 1999) (quoting *McNellis v. First Fed. Sav. and Loan Ass'n*, 364 F.2d 251, 257 (2d Cir. 1966)).[1]

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[1] We are not persuaded by the defendants' argument that Hudson's letter to the court in *Hudson II*, in which he stated he did not wish to amend his complaint, indicates Hudson's voluntary relinquishment of an opportunity to amend his complaint and raise claims regarding *Bronx House*. This letter was sent *after* Hudson had been expressly admonished by the magistrate judge that he could not bring in new claims regarding *Bronx House*.

Accordingly, we AFFIRM the district court's dismissal of the *No Harm, No Foul* claims, VACATE the dismissal of the *Bronx House* claims, and REMAND the *Bronx House* claims for further proceedings. We reject the remainder of Hudson's arguments, including his claim of alleged bias on the part of the judges involved in *Hudson II*, as without merit.

FOR THE COURT:
Thomas Asreen, Acting Clerk
By:

/s/ Lucille Carr

APPENDIX G

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

GREGORY HUDSON,	:	
Plaintiff,	:	04 Civ. 6997 (GEL)
v.	:	**OPINION AND ORDER**
UNIVERSAL STUDIOS, INC., *et al.*,	:	(Filed Apr. 28, 2006)
Defendants.	:	

Gregory Hudson, *pro se*.

Richard Dannay and Thomas Kjellberg,
Cowan Liebowitz & Latman, P.C.,
New York, NY, *for defendants*.

GERARD E. LYNCH, District Judge:

Plaintiff Gregory Hudson brings this action for copyright infringement and related claims against a number of defendants, alleging principally that defendants copied elements of a 1999 motion picture, *Life*, from a work he had written called *Bronx House*. Defendants moved to dismiss on the ground of, inter alia, res judicata, arguing that plaintiff's claims are precluded by a decision in an earlier case filed by plaintiff against many of the same parties. *See Hudson v. Universal Pictures Corp.*, No. 03 Civ. 1008 (FB) (LB), 2004 WL 1205762 (E.D.N.Y. Apr. 29, 2004)

("*Hudson II*"), *aff'd sub nom. Hudson v. Imagine Entm't Corp.*, 128 Fed. Appx. 178 (2d Cir. 2005), *cert. denied*, 2006 WL 985653 (Apr. 17, 2006). On February 16, 2006, the Honorable Theodore H. Katz, United States Magistrate Judge, to whom the case had been referred for general pre-trial management, issued a thorough and well-reasoned Report and Recommendation ("R&R") recommending that the motion be granted. Plaintiff in due course filed objections to the R&R. Having carefully considered the record, the R&R, the plaintiff's objections, and reviewed the issues presented by the motion de novo, the Court overrules the objections, adopts the careful and well-reasoned R&R as the opinion of the Court, and grants the motion.

The facts are laid out fully and accurately in the R&R. In the *Hudson II* litigation in the Eastern District of New York, plaintiff claimed that *Life* was copied from a work of his called *No Harm, No Foul.* Midway through the litigation, he began to assert claims relating to *Bronx House*. Although the Magistrate Judge initially rejected plaintiff's effort to inject claims relating to *Bronx House* into the litigation, the record is clear that plaintiff nevertheless persisted in presenting evidence relating to *Bronx House* to the court, specifically asserting, in his opposition to defendants' summary judgment motion, that portions of *Life* were "copied from [his] stage play entitled, *Bronx House*," and referencing an exhibit setting forth

similarities between the two works. (Kjellberg Decl. Ex. J at 10.)[1] In ruling on the defendants' motion for summary judgment, Judge Block first ruled that "no reasonable jury could find a substantial similarity between the protected elements of *No Harm, No Foul* and *Life*." *Hudson II*, 2004 WL 1205762, at *4. However, far from rejecting plaintiff's *Bronx House* claims as irrelevant to the litigation, the Court then went on to note that plaintiff "also asserts that *Life* was copied from . . . [plaintiff's] other play *Bronx House*," and to rule that this contention was "meritless." *Id.*

There is thus no question that plaintiff presented his claims regarding *Bronx House* to the court in *Hudson II*, in spite of the court's previous interim procedural rulings that the claims were beyond the scope of his complaint, and that the court then proceeded to rule on them.

Plaintiff's only significant objection to the R&R is the argument that Judge Block did not really

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[1] Plaintiff claims that he did this for the limited (if somewhat inscrutable) purpose of "avoid[ing] losing credibility with" the Magistrate Judge in *Hudson II*. (P. Mem. Objection to R&R at 10), or "for the *sole* purpose of getting a 'written response' from the Court and the opposition verifying and clearly stating that *Bronx House* was not part of *Hudson II*." (*Id.* at 14; emphasis in original.) But whatever plaintiff thought he was doing at the time, or however plaintiff would like to spin it now, the undisputed fact is that plaintiff submitted to the court, *after* the court's attempt to rule *Bronx House* out of the case, a comparative analysis of elements of *Life* and *Bronx House* that was before the court when *Hudson II* was decided.

adjudicate his claim that *Life* was copied from *Bronx House* because the case had not been fully and fairly presented. Part of his argument can be dismissed as a mere verbal quibble: plaintiff argues that Judge Block never says that he "adjudicated" the claim, only that he "reviewed" and "considered" it. (P. Mem. Objection to R&R at 16-17.) This is unpersuasive; the opinion in *Hudson II* is crystal clear that the court "finds" the claim that *Life* was copied from *Bronx House* "meritless." 2004 WL 1205762, at *4.

Plaintiff is on more substantive ground in arguing that the adjudication regarding *Bronx House* should not preclude further litigation because he did not have an adequate opportunity in *Hudson II* to develop his claims. (P. Mem. Objection to R&R at 18-20.) Because the Magistrate Judge had resisted plaintiff's attempts to bring *Bronx House* into the litigation, Hudson claims, he did not obtain adequate discovery regarding his *Bronx House* claims, and was able to present the court only with a sketchy summary of his contentions, and not with a full record. Unlike his verbal quibble, this argument presents a substantive claim that plaintiff was treated unfairly. But the argument that a judicial decision was unjust or infected by procedural error warrants an appeal, not a second lawsuit attempting to present the same claims to a different court. And indeed, plaintiff, clearly aware that Judge Block had addressed and rejected his *Bronx House* claims, pursued the argument that the *Bronx House* claims had not received full and fair consideration.

First, plaintiff moved for rehearing, arguing among other things that because his attorney had mistakenly failed to amend his complaint to include *Bronx House*, "evidence demonstrat[ing] that defendants copied from *Bronx House* and *No Harm, No Foul* . . . [had] not been presented and discovery has not been completed . . . , and therefore a summary judgment for the defendants is improper." (Kjellberg Decl. Ex. L at 10) Then, on appeal, plaintiff further argued that the admission into evidence of the full script of *Bronx House* at trial would have warranted a verdict for plaintiff on the claims at issue in *Hudson II*. (*Id.* Ex. M at 18). The Second Circuit, however, summarily rejected this along with Hudson's other arguments as "without merit." 128 Fed. Appx. at 179.

In short, whatever rulings may have been made in the discovery phase of the Eastern District litigation in *Hudson II*, plaintiff affirmatively presented to the court in response to the summary judgment motion in that case the claim that *Life* was copied from *Bronx House* as well as from *No Harm, No Foul*,[2]

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[2] Moreover, even assuming, arguendo, that the plaintiff did not actually present a claim based on *Bronx House* in the *Hudson II* litigation, he could have and should have presented such a claim in his *Hudson II* complaint, given the close relation of the *Bronx House* claim to the *No Harm, No Foul* claim. (R& R 30-31); *see Monahan v. New York City Dep't of Corrections*, 214 F.3d 275, 285 (2d Cir. 2000) (explaining that res judicata may apply where "the claims asserted in the subsequent action were, or could have been, raised in the prior action"); *see also Pike v. Freeman*, 266 F.3d 78, 91 (2d Cir. 2001) (explaining that "the 'could have been' language of the [res judicata standard] is

(Continued on following page)

and when the court in that case rejected the claim, he proceeded to argue, on rehearing and on appeal, that he had been treated unfairly because (arguably confused or misled by the discovery rulings) he had only presented a summary of the alleged similarities between *Life* and *Bronx House* and the court had not seen the full script of the latter. Both the District Court and the Court of Appeals rejected that argument, and the District Court's finding that the claim that *Life* was copied from *Bronx House* was "meritless" was affirmed on appeal. Whether that finding was right or wrong, fairly rendered or procedurally flawed, it is now res judicata and plaintiff may not relitigate the claim in this Court.[3]

For these reasons, plaintiff's objections to the R&R are overruled, the R&R is adopted as the opinion of the Court, the defendants' motion to dismiss the complaint or for summary judgment is granted, and the complaint is dismissed.

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something of a misnomer," because "[t]he question is not whether the applicable procedural rules permitted assertion of the claim in the first proceeding[, but] whether the claim was sufficiently related to the claims that were asserted in the first proceeding that it should have been asserted in that proceeding").

[3] Plaintiff also presents a contract claim based on *No Harm, No Foul*. This Court agrees with and adopts the R&R's conclusion that this claim is also barred by res judicata. (R&R 12, 24-26.)

SO ORDERED.

Dated: New York, New York
April 26, 2006

/s/ Gerard E. Lynch
GERARD E. LYNCH
United States District Judge

APPENDIX H

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United State's Courthouse, 500 Pearl Street, in the City of New York, on the 29th day of July, two thousand and ten.

Gregory L. Hudson,

Plaintiff-Appellant,

v.

Universal Studios, Inc., Universal Pictures, Inc., Imagine Films Entertainment, LLC,

Defendants-Appellees.

ORDER

Docket No: 09-0187

(Filed Jul. 29, 2010)

IT IS HEREBY ORDERED that costs are taxed in the amount of $1,080 in favor of Appellees.

FOR THE COURT,
Catherine O'Hagan Wolfe, Clerk

/s/ Catherine O'Hagan Wolfe
Joy Fallek, Administrative Attorney

APPENDIX I

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United State's Courthouse, 500 Pearl Street, in the City of New York, on the 13th day of July, two thousand and ten.

GREGORY L. HUDSON,

Plaintiff-Appellant,

-v.-

UNIVERSAL STUDIOS, INC., UNIVERSAL PICTURES, INC., IMAGINE FILMS ENTERTAINMENT, LLC,

Defendants-Appellees.

Docket No. 09-0187-cv

(Filed Jul. 13, 2010)

Gregory Hudson having filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*, and the panel that determined the appeal having considered the request for panel rehearing, and the active members of the Court having considered the request for rehearing *en banc*,

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

/s/ Catherine O'Hagan Wolfe

APPENDIX J

17 U.S.C. § 102(a)(3)

(a) Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories:

(3) dramatic works, including any accompanying music;

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28 U.S.C. § 455(a)

A Justice, Judge, or Magistrate of the United States is required to recuse himself in any proceeding in which his impartiality might reasonably be questioned

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28 U.S.C. §100.2

A judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities.

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28 U.S.C. § 636(b)(1)(c)

(a) Each United States magistrate judge serving under this chapter shall have within the district in which sessions are held by the court that appointed

the magistrate judge, at other places where that court may function, and elsewhere as authorized by law –

(1) all powers and duties conferred or imposed upon United States commissioners by law or by the Rules of Criminal Procedure for the United States District Courts;

CPLR 3212(f)

"Any motion for summary judgment made prior to any discovery, or when further discovery is needed because crucial facts are peculiarly within movant's knowledge, is inappropriate because it seriously disadvantages the party or parties against whom the motion is brought."

Fed. R. Civ. P. 12(b)(6)

"If on a [12(b)(6)] motion . . . to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56.

Fed. R. Civ. P. Rule 26(a)(1)

In General. Except as exempted by Rule 26(a)(1)(B) or as otherwise stipulated or ordered by the court, a party must, without awaiting a discovery request, provide to the other parties:

(i) the name and, if known, the address and telephone number of each individual likely to have discoverable information – along with the subjects of that information – that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment. . . .

Fed. R. Civ. P. 26(f)

Except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B) or when the court orders otherwise, the parties must confer as soon as practicable – and in any event at least 21 days before a scheduling conference is to be held or a scheduling order is due under Rule 16(b).

Fed. R. Civ. P. 38(a)(b)

The right of trial by jury as declared by the Seventh Amendment to the Constitution – or as provided by a federal statute – is preserved to the parties inviolate . . . on any issue triable of right by a jury, a party may demand a jury trial by:

(1) serving the other parties with a written demand. . . .

Fed. R. Civ. P. 56(c)

Summary judgment is appropriate where "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitle to judgment as a matter of law."

In deciding a motion for summary judgment, the court must "draw all factual inferences in favor of, and take all factual assertions in the light most favorable to, the party opposing summary judgment."

Fed. R. Civ. P. 56(c)(1)(A)(B)

A party asserting that a fact cannot be or is genuinely disputed must support the assertion by:

(A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials.

Fed. R. Civ. P. 56(e)

If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56(c), the court may:

(1) give an opportunity to properly support or address the fact;

(2) consider the fact undisputed for purposes of the motion.

Fed. R. Civ. P. 56(f)

Where for some reason the opposing party cannot set forth facts sufficient to survive a motion for summary judgment, *Rule 56(f)* gives the opposing party opportunity to submit an affidavit explaining the reason.

Fed. R. Evid. 1002

Rule 1002 of the FRE; It states "that an original document should be produced in court when its terms are material to the argument – when it is the 'best evidence' available.

Fed R. Evid. 1007

"Testimony or Written Admission of Party Contents of writings, recordings, or photographs may be proved by the testimony or deposition of the party against whom offered or by that party's written admission, without accounting for the nonproduction of the original."

Treaties

Nimmer on copyright, supra, §13.03[B][1][a]

These similarities are known as "nonliteral similarity," which can either be "comprehensive" or "fragmented." (See M. Nimmer and D. Nimmer, COPYRIGHT, § 13.03[A][1] (2005)).